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No. 96-1755

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ARTHUR CALDERON, Warden,
Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA,
Respondent,

BLUFFORD HAYES, JR.,
Real Party in Interest.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a state court denies, as untimely, a habeas petition which is not filed within a reasonable time after clarification of the state's timeliness rules, is the state bar "inadequate" for the purpose of the procedural default rule in federal habeas corpus?

2. Are state procedural default rules "inadequate" simply because they are phrased in terms no less precise than comparable federal rules?

3. In determining whether a state court "regularly follows" a procedural default rule, should cases in which petitions are denied under one rule be considered a failure to follow all other rules that may be alternate grounds for denial?

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MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition in this case. Counsel for petitioner has consented, but counsel for respondent has withheld consent.

In the accompanying brief, *amicus* argues that the massive impact of this line of cases on California, the conflict with other circuits regarding the specificity required of procedural default rules, and the Ninth Circuit's extreme and unprecedented interpretation of the requirement that a default rule be regularly followed make this case appropriate for review.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The Ninth Circuit's refusal to respect California's delayed petition rule in the present case and the cases on which it relies has needlessly delayed enforcement of the state's death penalty, reducing its deterrent effect. Those delays are contrary to the rights of victims and society which CJLF was formed to advance.

For the foregoing reasons, *amicus* requests leave to file its brief.

May, 1997

Respectfully submitted,

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Criminal Justice Legal Foundation

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SUMMARY OF FACTS AND CASE

On January 1, 1980, Blufford Hayes murdered Vinod Patel in the course of a burglary.[1] He was convicted of these crimes and sentenced to death. *People* v. *Hayes*, 52 Cal. 3d 577, 597, 802 P. 2d 376, 387 (1990). Hayes filed a petition for a writ of habeas corpus in the California Supreme Court in 1987, which was denied on May 18, 1989. *Calderon* v. *U. S. District Court (Hayes)*, 103 F. 3d 72, 73 (CA9 1996). Shortly thereafter, on June 6, 1989, the California Supreme Court announced specific

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1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover. No outside contributions were made to the preparation or submission of this brief.

standards regarding the long-established rule that habeas petitions in capital cases be filed in a timely manner. *Id.*, at 74. In 1990, the California Supreme Court affirmed Hayes' conviction and sentence on direct appeal. *Hayes*, 52 Cal. 3d, at 646, 802 P. 2d, at 420. This Court denied certiorari on November 12, 1991. *Hayes* v. *California*, 502 U. S. 958 (1991).

In 1993, Hayes filed his first habeas petition in federal court, which was stayed pending exhaustion of all claims in state court. *Calderon* v. *U. S. District Court (Hayes)*, 103 F. 3d, at 73. Hayes then filed, in 1994, a second habeas petition in the California Supreme Court, nearly five years after the announcement of California's timeliness standards. *Ibid.*

The California Supreme Court denied 32 claims on procedural grounds. *Id.*, at 73-74.

Hayes returned to the federal District Court and filed an amended habeas petition. *Ibid.* The District Court denied the state's motion to dismiss 32 of the claims as procedurally barred. *Id.*, at 74. The state's petition for a writ of mandamus was denied by the Court of Appeals. *Id.*, at 75.

SUMMARY OF ARGUMENT

The decision of the Ninth Circuit in this case and other cases of the same line will impose a massive burden of unnecessary litigation on California.

By focusing on the filing of the first petition as the time of default, the Ninth Circuit overlooked the nature of timeliness rules. A failure to file a petition within a reasonable time is a continuing default, commencing with the time the petition should have been filed and continuing until the petition is filed. Changes in timeliness rules can and should apply to a continuing default, so long as the person subject to them is allowed a reasonable time to file after any adverse change.

California's timeliness rule was "clearly established," at the absolute latest, on June 6, 1989, with the announcement of the

California Supreme Court Policies. Hayes' state petition raising the claims at issue here was not filed until almost five years later.

The Ninth Circuit is in conflict with other circuits regarding the degree of specificity a state procedural rule and its exceptions must have to be considered "adequate" on federal habeas. Rules which are every bit as broadly worded as the language found too vague here are routinely accepted in other circuits.

In attempting to determine whether California "regularly follows" its timeliness rule, the Ninth Circuit counted, as failures to follow, cases in which multiple procedural defaults were potentially applicable, and a default other than untimeliness was the basis of denial. This distortion of the "regularly followed" requirement has no basis in this Court's precedents or in the purpose or rationale of the requirement.

ARGUMENT

I. The decision below will impose a massive burden of unnecessary litigation on California.

A. Magnitude of the Problem.

Federal courts hearing habeas corpus cases should "accord[ ] fitting respect to the State's procedural rules, which are indispensable to the administration of its criminal justice system." *Lambrix* v. *Singletary*, 520 U. S. ___ (No. 96-5658, May 12, 1997) (slip op., at 1) (O'Connor, J., dissenting). It would be difficult to conceive of a greater violation of this principle than the Ninth Circuit's cavalier brushing aside of *all* of California's procedural rules. The consequences of this error are staggering, and they call for this Court's intervention.

In a line of cases beginning with *Siripongs* v. *Calderon*, 35 F. 3d 1308 (CA9 1994) and continuing to the present case, the Ninth Circuit has disregarded, as "inadequate," all of California's procedural default rules applied to cases decided prior to

In re Clark, 5 Cal. 4th 750, 855 P. 2d 729 (1993).[2] See *Calderon* v. *U. S. District Court (Hayes)*, 103 F. 3d 72 (1996); *Calderon* v. *U. S. District Court (Bean)*, 96 F. 3d 1126 (1995), cert. denied, 520 U. S. ___ (No. 96-1355, April 28, 1997); *Morales* v. *Calderon*, 85 F. 3d 1387 (1995). As the Attorney General has pointed out, as many as 140 cases may be affected by this erroneous line of decisions. Pet. for Cert. 8, n. 1; see also California Department of Corrections, CDC Condemned Inmate List (Sentences Affirmed by the California Supreme Court) (April 1, 1997). Since many of these cases will involve numerous defaulted claims,[3] California will be forced to litigate the merits of thousands of claims that should otherwise be barred from federal court.

The principal harms that will result from the Ninth Circuit's decisions are the cost and delay of unnecessary litigation. Even if California prevails on every defaulted claim, the state still loses. Litigation is expensive. In the process of winning these claims, California will be forced to expend substantial resources. It is the litigation itself, and not its outcome, that will harm the state the most.

Furthermore, this unnecessary litigation will result in further delays in the administration of justice. Hayes' untimely claims, raised for the first time in federal court, have already resulted in a two-year delay as Hayes exhausted his state remedies. That two-year delay will be further increased by the time and effort required to litigate Hayes' defaulted claims. California is doomed to repeatedly suffer this unnecessary delay as the 140 pre-*Clark* capital cases now pending in the state pass through federal habeas.

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2. The Ninth Circuit has not yet considered whether California's procedural rules are adequate when applied to cases arising after *Clark* was decided. See *Morales* v. *Calderon*, 85 F. 3d 1387, 1391 (CA9 1996).

3. An average of 30 claims per case were defaulted in the line of cases on this issue. See *Siripongs*, 35 F. 3d, at 1316 (3 claims); *Morales*, 85 F. 3d, at 1388-1389 (36 claims); *Bean*, 96 F. 3d, at 1128 (49 claims); *Hayes*, 103 F. 3d, at 74 (32 claims).

B. Default and Timeliness.

The principal procedural rule at issue in the present case is California's rule on untimely habeas petitions.[4] However, in disregarding this rule as inadequate, the Ninth Circuit has failed to consider the unique nature of timeliness rules as well as the individual facts of the cases before it. It also failed to recognize the importance of the California Supreme Court Policies in cases of delayed petitions. As a result, hundreds of untimely, defaulted claims will have to be litigated in federal court.

Both federal and state courts recognize the necessity of creating procedural rules to govern the proper resolution of claims. Most procedural rules are based on concerns with the timely presentation of claims in the appropriate forum. In the context of habeas corpus litigation, such rules are necessary because the existence of "habeas corpus review may give litigants incentives to withhold claims for manipulative purposes and may establish disincentives to present claims when evidence is fresh." *McCleskey* v. *Zant*, 499 U. S. 467, 491-492 (1991). The specific rules that have developed serve to limit both delay and the withholding of claims at various stages of a case.

The procedural rules that most often result in defaults are devised to encourage the timely presentation of claims. At trial, failure to comply with a contemporaneous objection rule can result in the loss of a claim. See Fed. Rule Evid. 103(a); Cal. Evid. Code § 353. This rule allows the trial judge, in the best position to consider the claim, an opportunity to rule on the issue. Another common rule bars claims from collateral review that should have been presented on appeal. See *United States* v. *Frady*, 456 U. S. 152, 165 (1982); *In re Dixon*, 41 Cal. 2d 756, 759, 264 P. 2d 513, 514 (1953). Similarly, claims pre-

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4. Out of the 44 claims brought by Hayes in his second state habeas petition, 32 were barred as untimely. Furthermore, undue delay was the principal procedural default in both *Morales* v. *Calderon*, 85 F. 3d, at 1388-1389 and *Calderon* v. *U. S. District Court (Bean)*, 96 F. 3d, at 1128.

sented for the first time in a second or subsequent habeas petition may be defaulted. See *McCleskey*, *supra*, 499 U. S., at 470 ("abuse of the writ"); *In re Clark*, 5 Cal. 4th 750, 767-768, 855 P. 2d 729, 740 (1993) ("piecemeal presentation of claims"). These two rules limit repetitive habeas petitions and encourage presentation of claims at the earliest possible time in the litigation. Finally, claims that are not raised in a generally timely manner are subject to default. See 28 U. S. C. § 2254 Rule 9(a); *Lonchar* v. *Thomas*, 134 L. Ed. 2d 440, 453, 116 S. Ct. 1293, 1300 (1996); *In re Clark*, 5 Cal. 4th, at 765, 855 P. 2d, at 738. Timeliness rules serve a purpose similar to statutes of limitations by guarding against the presentation of stale claims.

Of these procedural rules, general timeliness rules are unique in their application. The other rules are typically triggered by a discrete event. For example, default for failure to comply with a contemporaneous objection rule occurs only at a specific point during a trial. Similarly, omitted claims on appeal are defaulted when issues are briefed or "assignments of error" made. In contrast, a default under a timeliness rule such as 28 U. S. C. § 2254 Rule 9(a) is a continuing default. A claim is untimely if not made within a reasonable time, and it gets more untimely every day until it is finally asserted.

C. California's Timeliness Rules.

California has long-standing timeliness rules that pre-date all aspects of Hayes' case, as the Attorney General has set forth. Pet. for Cert. 10. On the other hand, the Ninth Circuit has taken the position that California, at least prior to *In re Clark*, had no clear timeliness rules for habeas petitions. See *Calderon* v. *U. S. District Court (Hayes)*, 103 F. 3d 72, 74-75 (1996). While supporting the position of the Attorney General, *amicus* submits that June 6, 1989, stands as the absolute *latest* date in which California's timeliness rules could be considered firmly established. On that date, the California Supreme Court announced its Supreme Court Policies Regarding Cases Arising from Judgments of Death, West's Cal. Codes, 3 Court Rules

143-146 (1996) ("Policies"). The Policies included specific timeliness standards for habeas petitions. *Id.*, at 143-144.

The general rule is that a petition should be filed "without substantial delay." There are three independent means of qualifying under this rule. First, a petition can be filed within 90 days after the brief on appeal. *Id.*, Standard 1-1.1, at p. 144. Second, a petition may be filed within a reasonable time after petitioner or counsel knew or should have known of the factual or legal basis. *Id.*, Standard 1-1.2. This is the criterion established in pre-Policies case law. See *In re Stankewitz*, 40 Cal. 3d 391, 396-397, n. 1, 708 P. 2d 1260, 1262, n. 1 (1985). Third, for cases arising prior to *Stankewitz*, the petition may be filed within a reasonable time after the date of that decision. *Id.*, Standard 1-1.3.

The Policies further provided for investigation of "potentially meritorious grounds for relief," *id.*, Standard 1-1, and compensation of counsel for that effort. *Id.*, Standard 2-2. *In re Clark*, 5 Cal. 4th, at 785, 855 P. 2d, at 752, recognized that prior to the Policies there was no duty of investigation on appellate counsel and indicated that "claims that were discovered only as a result of investigation commenced promptly after June 6, 1989, the date on which the Policies became effective, will be deemed timely if presented promptly after counsel became aware of them."

The Fourth Circuit noted in *O'Dell* v. *Netherland*, 95 F. 3d 1214, 1241 (1996), cert. granted on other grounds, No. 96-6867, "As a general matter, whenever a procedural rule is derived from state statutes and supreme court rules . . . the rule is necessarily 'firmly established.' " There is no material difference between supreme court rules and the Policies for this purpose. The Policies thus firmly establish the rule, assuming *arguendo* it was not previously established, they apply to preexisting claims, and they reasonably accommodate any reliance on prior uncertainty in the law. Whatever debate there may be about earlier law, on June 6, 1989, California's timeliness rule was firmly established.

D. New Timeliness Rules and Pending Cases.

Obviously, it would be unfair to apply a new procedural default rule, like a contemporaneous objection rule, to bar a claim when the petitioner's only opportunity to comply with the rule occurred before the rule existed. See *Ford* v. *Georgia*, 498 U. S. 411, 424 (1991). Such an application would be retroactive and raise due process concerns. The same fairness concerns are not present when general timeliness rules are applied to claims pending when the rules are announced, so long as the petitioner has a reasonable opportunity to comply with the new rules. It is not unfair to ask a petitioner to assert claims in a timely manner from a specific point in time forward. Conversely, it would be unfair to the state to allow a petitioner whose claim arose prior to a particular timeliness rule to ignore the rule and continually delay asserting the claim.

Timeliness rules are analogous in practice to statutes of limitations and, therefore, should apply to pending cases in the same manner. Federal law recognizes that changes to statutes of limitations may apply to preexisting claims. See *Sohn* v. *Waterson*, 17 Wall. 596, 600 (1873); *Reyes* v. *Keane*, 90 F. 3d 676, 679 (CA2 1996). The only restraint on applying a shorter period of limitations to pending cases is that a reasonable time to comply with the new statute must be allowed. See *Texaco, Inc.* v. *Short*, 454 U. S. 516, 527, n. 21 (1982). California follows a similar rule. *Aronson* v. *Superior Court*, 191 Cal. App. 3d 294, 297, 236 Cal. Rptr. 347, 349 (1987). A claimant who fails to raise his claims within a reasonable time after the promulgation of the rule has no basis for complaint regarding its application to his case.

E. Hayes' Default.

In the present case, the Ninth Circuit indicated that Hayes' default occurred in 1987, when he "filed his first state habeas petition and failed to raise all of his claims." *Calderon* v. *U. S. District Court (Hayes)*, 103 F. 3d 72, 75 (1996). This statement is correct as to the successive petition rule but simply ignores

the timeliness rule. The latter rule involves a continuing default. In 1989 at the very latest, Hayes was placed on notice that timely habeas petitions were required by the California Supreme Court and that any substantial delay must be justified by "good cause." Since Hayes continued to delay after receiving such notice, the California Supreme Court properly determined his claims were defaulted.

The chart in the Appendix shows the significant events that occurred during the pendency of Hayes' case.

A review of this chronology reveals several instances of substantial delay by Hayes which occurred after the Policies were announced. First, Hayes waited almost *five years* after the announcement of the Policies to finally assert his delayed claims. At the time the Policies were announced, Hayes' appeal was still pending and he was represented by counsel. Moreover, Hayes had already filed a habeas petition that had been denied by the California Supreme Court only 19 days before. Nevertheless, Hayes made no attempt to comply with the timeliness rules that the California Supreme Court expressly indicated applied to all pending cases.

Another instance of delay is shown by the period between Hayes' first habeas petition in federal court and his second state habeas petition. At the time Hayes filed his federal habeas petition, June 22, 1993, it contained 44 claims which had not yet been presented to California courts. Although Hayes was clearly aware of all the factual and legal bases for these claims on that date, he waited an additional ten months to file those claims in state court.

Finally, Hayes waited nearly nine months after the California Supreme Court's decision in *In re Clark* to assert his delayed claims in state court. Any one of the above delays is sufficient to deny Hayes' defaulted claims.

Between the announcement of the Policies, June 6, 1989, and *In re Clark*, July 29, 1993, the California Supreme Court affirmed 92 death sentences on appeal. See California Department of Corrections, CDC Condemned Inmate List (Sentences

Affirmed by the California Supreme Court) (April 1, 1997). As these cases enter federal habeas, the need to exhaust state remedies will undoubtedly result in the filing of hundreds of untimely claims in the California Supreme Court. Most of these claims will be held to be defaulted in violation of the timeliness standards in the Policies. Under the rationale of the present case, however, federal courts will refuse to acknowledge the adequacy of such defaults, regardless of the length of the delay. As a result, California will have to expend significant resources in unnecessary litigation.

Capital punishment creates inherent incentives for delay. So long as a habeas court stays a petitioner's execution, the death sentence is frustrated. This delay imposes a significant cost to the state, especially in capital litigation, because it robs our criminal justice system of the finality necessary to give law its deterrent effect. See *McCleskey* v. *Zant*, 499 U. S. 467, 491 (1991). In the present case, the Ninth Circuit has failed to recognize the significant cost to California of delay and the state's interest in enforcement of its timeliness rules. As a result, the Ninth Circuit has excused undue delay in this case and others, and will continue to do so in future cases. Certiorari should be granted to prevent further harm to California's interests.

II. The courts of appeals are in conflict over established state rules with broadly defined criteria or exceptions.

A state procedural rule must be "adequate" to bar a claim from federal habeas. The standard for adequacy is usually stated as a requirement that the state rule be "firmly established and regularly followed . . . ." *James* v. *Kentucky*, 466 U. S. 341, 348-349 (1984). This standard has presented little difficulty when the very existence of the rule at the time of the default is so unclear that "petitioner could not fairly be deemed to have been apprised of [the rule's] existence." *NAACP* v. *Alabama* (*Patterson*), 357 U. S. 449, 457 (1958). Most, if not all, of this court's cases holding state bars inadequate fall into this cate-

gory. See, *e.g.*, *Ford* v. *Georgia*, 498 U. S. 411, 424 (1991) (retroactive application of new rule); *Johnson* v. *Mississippi*, 486 U. S. 578, 587 (1988) (state supreme court precedent contrary to later-asserted rule).

When the focus of the habeas petitioner's attack is not on the existence of the rule or its applicability to the case, but rather on its definiteness or the granting of exceptions, the law is much less clear. *Dugger* v. *Adams*, 489 U. S. 401 (1989) is typical of these cases. The state procedural bar was assailed as "inadequate" because "the Florida Supreme Court . . . has addressed the merits in several cases raising [the same claim] on postconviction review." *Id.*, at 411, n. 6. Unfortunately, the *Adams* Court relegated its rejection of this contention to a footnote and provided little guidance for lower courts.

Procedural default rules very often have exceptions defined in general terms. For example, Rule 30 of the Federal Rules of Criminal Procedure establishes a procedural default rule for jury instructions. Rule 52(b) then creates an exception for "[p]lain errors . . . affecting substantial rights . . . ." The wording of this rule has not changed since 1944, yet its contours are still being defined. See *United States* v. *Olano*, 507 U. S. 725, 732 (1993); *Johnson* v. *United States*, 520 U. S. ___ (No. 96-203, May 12, 1997) (slip op., at 3) (circuit conflict on meaning of "substantial rights"). Broad terms such as "plain" and "substantial" acquire concrete meaning only through the accretion of case law. In federal habeas law, broad statutory phrases such as "ends of justice" and "abused the writ," 28 U. S. C. § 2244(a), (b), have similarly evolved through case law. See, *e.g.*, *Sanders* v. *United States*, 373 U. S. 1, 18 (1963) (deliberate withholding); *McCleskey* v. *Zant*, 499 U. S. 467, 493 (1991) (cause and prejudice).

Not surprisingly, many states have faced similar situations with regard to their procedural default rules. Rules established by statute, rule of court, or case law frequently have broadly worded exceptions which have been made more concrete through recent case law, just like the federal rules. The "ade-

quacy" of such rules as procedural defaults, when the defaulted claims are presented in federal habeas, varies radically between circuits.

The Ninth Circuit's holding in the present case rests on *Calderon* v. *U. S. District Court* (*Bean*), 96 F. 3d 1126, 1130 (CA9 1996), which in turn rests on *Morales* v. *Calderon*, 85 F. 3d 1387 (CA9 1996). See *Calderon* v. *U. S. District Court* (*Hayes*), 103 F. 3d 72, 74 (CA9 1996). *Morales* denied preclusive effect to defaults occurring between the promulgation of the Policies and the decision in *In re Clark*, 5 Cal. 4th 750, 855 P. 2d 729 (1993) based on three premises. First, *Morales* asserted that the Policies were "uncertain" because they did not define "substantial" delay or criteria for determining "good cause." *Morales*, 85 F. 3d, at 1391. Second, the California Supreme Court in *Clark* had acknowledged the lack of clear criteria for *departure* from the rules, not the rules themselves. The third ground, based on the number of delayed petitions denied on other grounds, will be addressed in part III, below.

The Ninth Circuit's treatment of the "vagueness" of the state rule forms a sharp contrast with the treatment in other circuits. While paying lip service to the value of discretion in the application of rules, the Ninth Circuit demands "standards that, at least over time, can become known and understood within reasonable operating limits." *Morales*, 85 F. 3d, at 1392. In other words, unless the state rule is sufficiently structured that the Ninth Circuit can look over the state's shoulder and see if it is applying its own rule correctly, the rule is "inadequate." From the mere fact that the Ninth Circuit has no way of knowing whether the California Supreme Court is exercising its discretion in a principled manner, *ibid.*, the state rule is tossed out.[5]

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5. This statement could also be interpreted as an assertion that the state has the burden of proving the adequacy of its rule, a point briefed by the Attorney General. See Pet. for Cert. 20-21.

Flexible state rules meet with a very different fate in other circuits. In *Prihoda* v. *McCaughtry*, 910 F. 2d 1379, 1381 (CA7 1990), the state rule permitted exceptions for "sufficient reason." This would surely have failed the Ninth Circuit's *Morales* test, but the Seventh Circuit held that the inevitable uncertainty in application was not enough to defeat the rule's adequacy. *Id.*, at 1385. In *Duvall* v. *Purkett*, 15 F. 3d 745, 747 (1994), the Eighth Circuit had no problem with a state rule creating an exception for "manifest injustice," noting that it was similar to rules applicable in federal courts. The Tenth Circuit in *Andrews* v. *Deland*, 943 F. 2d 1162, 1190 (1991) and the Fifth Circuit in *Amos* v. *Scott*, 61 F. 3d 333, 342 (1995) have held that "an occasional act of grace" does not disqualify a state rule. Neither circuit held that the state must establish "reasonable operating limits" for the dispensation of grace that the Ninth Circuit would require.

Throughout the country, states are in the process of reshaping their procedural default rules. The reshaping may be in the form of case law, as in California under *Clark*, or by legislation. See, *e.g.*, Tex. Code Crim. Proc. Ann., Art. 11.071, § 5 (Vernon's Supp. 1997). In formulating these rules, state courts and legislatures need to know how much latitude for "occasional acts of grace" can be allowed before a state rule will be rendered a virtual nullity and every barred claim will have to be litigated in federal court. The split between the Ninth Circuit and the other circuits leaves that question up in the air.

III. The Ninth Circuit's strained interpretation of the requirement that a procedural default rule be regularly followed calls for this Court's intervention.

The third reason given to justify the result in *Morales* v. *Calderon*, 85 F. 3d 1387 (CA9 1996) was this: "Morales asserts that at the time his case was litigated in the district court, the California Supreme Court had *denied* 35 habeas petitions filed three years or more after affirmance on direct appeal, and

more than half of those denials had not been on grounds of untimeliness." *Id.*, at 1391 (emphasis added).

On its face, this statistic is utterly insufficient to prove that California's timeliness rule is not regularly followed. For example, two of the cases urged to support this proposition were the third habeas petitions of James Karis and James Odle. Brief for Appellant in *Morales* v. *Calderon*, Ninth Circuit No. 94-99010, at 26-27, n. 23. Karis' third petition was denied as successive. See *Karis* v. *Vasquez*, 828 F. Supp. 1449 (ED Cal. 1993). Odle's third petition was denied both on the merits and on procedural grounds. See *Odle* v. *Calderon*, 884 F. Supp. 1404, 1412-1413 (ND Cal. 1995).[6]

By relying on such cases to advance the proposition that California applies its rules "at random," see *Morales*, 85 F. 3d, at 1392, the Ninth Circuit implicitly endorses the staggering assertion that reliance on one procedural default to deny a petition constitutes a failure to observe any other default rule that may apply. To prevent a case from being used in this manner, a state court would have to go through each potentially applicable reason for denying the petition, even though one is sufficient.

This Court has never endorsed such a pointless waste of judicial resources. On the contrary, this Court has repeatedly said that when a habeas petitioner must clear multiple hurdles, a court may stop when it determines he cannot clear one of them. See, *e.g.*, *Strickland* v. *Washington*, 466 U. S. 668, 697 (1984) (if no prejudice, need not resolve ineffectiveness issue). "Judicial economy might counsel giving the *Teague* question priority, for example, if it were easily resolvable against the habeas petitioner, whereas the procedural bar issue involved complicated issues of state law." *Lambrix* v. *Singletary*, 520 U. S. ___ (No. 96-5658, May 12, 1997) (slip op., at 6); *id.* (slip

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6. We cite these two cases as examples because the basis of denial in each is described in a later published opinion and thus readily available to this Court. There are other, similar cases which are not published.

op., at 2) (O'Connor, J., dissenting). If such a course is appropriate for the federal courts, there is no sensible reason why state courts cannot do the same.

The notion that denial of a petition based on one rule constitutes a failure to "regularly apply" another is so strange that it does not appear to have even been considered in other circuits or in this Court. Therefore, *amicus* is unable to say there is a split in the circuits in the narrow sense. However, this jarring holding is such a sharp departure from the purpose and underlying rationale of the "adequacy" rule that the question should be settled by this Court. See Supreme Court Rule 10(c).

Looking back through this Court's cases in which state bars were found inadequate, we see a consistent pattern of rules which trap, deceive, or mislead the defendant into failing to assert his federal right at the time or in the manner which the state court later determines was the required time or the required manner. See, *e.g.*, *Ford* v. *Georgia*, 498 U. S. 411, 424 (1991) (retroactive application of new procedural rule); *Johnson* v. *Mississippi*, 486 U. S. 578, 587-588 (1988) (state supreme court had expressly stated that collateral review, not sentencing and appeal, was proper forum for attacking priors); *NAACP* v. *Alabama* (*Flowers*), 377 U. S. 288, 297 (1964) (rule going only to form, not substance, applied with "pointless severity," unlike prior applications); *NAACP* v. *Alabama* (*Patterson*), 357 U. S. 449, 457 (1958) ("petitioner could not fairly be deemed to have been apprised of [the rule's] existence"). Justice Holmes captured the essence of the rule long ago. "Whatever springes the state may set for those who are endeavoring to assert rights that the state confers, the assertion of Federal rights, *when plainly and reasonably made*, is not to be defeated under the name of local practice." *Davis* v. *Wechsler*, 263 U. S. 22, 24 (1923) (emphasis added); see also *James* v. *Kentucky*, 466 U. S. 341, 349 (1984) (quoting *Davis*).

A state court's denial of a habeas petition under Rule A instead of Rule B, when either might have been invoked, does not set a "springe" for other petitioners who may be denied later

under Rule B. No rational person would interpret such a denial as questioning the existence of Rule B or as a green light to go ahead and disregard it. To invoke the "inadequate" state ground rule to permit claims which were *not* made within a reasonable time, by any stretch of the imagination, is a perversion of that rule.

The present case is, in a sense, the converse of *Patterson*, *Flowers*, *Johnson*, and *Ford*. In those cases, state courts adopted unforeseeable or hypertechnical interpretations of state rules to frustrate the assertion of federal rights. In the present case, the federal court had adopted a contorted interpretation of the federal habeas procedural default rule to defeat the plain and reasonable assertion of a compelling state interest: the requirement that a habeas petitioner make all his claims within a reasonable time.

This case thus presents an important federal question which has not been, but should be, decided by this Court, and a writ of certiorari is appropriate.

CONCLUSION

The petition for writ of certiorari should be granted.

May, 1997

Respectfully submitted,

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APPENDIX

CHRONOLOGY OF HAYES' CASE	
Oct. 29, 1987	*Hayes filed first state habeas petition*
May 18, 1989	*California Supreme Court denied Hayes' first habeas petition*
June 6, 1989	***California Supreme Court announced Supreme Court Policies Regarding Cases Arising from Judgments of Death***
Dec. 31, 1990	*California Supreme Court affirmed Hayes' conviction on appeal*
Nov. 12, 1991	*United States Supreme Court denied Hayes' petition for certiorari*
Oct. 27, 1992	*Counsel appointed for federal habeas*
June 22, 1993	*Hayes filed first federal habeas petition*
July 29, 1993	***California Supreme Court decided In re Clark and In re Harris***
Feb. 4, 1994	*Federal habeas stayed pending exhaustion of 44 claims in state court*
April 22, 1994	*Hayes filed second state habeas petition*
June 21, 1995	*California Supreme Court denied Hayes' second habeas petition*

See Pet. for Cert. 2-4.

Hayes Time Line